No. 15,282

IN THE

United States Court of Appeals

For the Ninth Circuit

RENALDO FERRARI, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE UNITED STATES.

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JURISDICTION.

On February 23, 1956 an indictment was filed in 16 counts against appellants and others in the United States District Court for the Northern District of California, Southern Division, charging violations of the Harrison Narcotic Act (26 U.S.C. Secs. 4704 & 7237 (1954 ed.)); the Jones Miller Act (21 U.S.C. Sec. 174); and conspiracy to violate said acts (18 U.S.C. Sec. 371) (Tr. 3-16). All appellants were named as defendants in the 16th count which charged a conspiracy to violate the Jones-Miller and Harrison Narcotic Acts (Tr. 11-16), and in addition, appellant Lester Darneille was charged in count one with violation of the Harrison Narcotic Act and in count two

with violation of the Jones-Miller Act (Tr. 5-6). The remaining counts of the indictment related to two co-defendants, Charles Garcia, Sr., and Charles Clarence Garcia, Jr., who pleaded guilty to certain of the charges prior to the commencement of the trial.

After a jury trial all appellants were found guilty as charged on count 16, and appellant Darneille was found guilty on count one and not guilty on count two (Tr. 41). Sentence was imposed and judgment entered on July 3, 1956, each defendant receiving a term of five years imprisonment and a $1.00 fine (Tr. 64-72).

Appellant Renaldo Ferrari filed his notice of appeal on July 13, 1956 (Tr. 77-78). Appellant John Orman Knight filed his notice of appeal on July 5, 1956 (Tr. 74-75); appellant Lester Darneille filed notice of appeal on July 9, 1956 (Tr. 76), and appellant Jack Cherpakov filed notice of appeal on July 11, 1956 (Tr. 73).[1]

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1291.

QUESTIONS PRESENTED.

1. Was the evidence sufficient to support the verdict as to appellants Ferrari and Darneille?

2. Was newspaper publicity prejudicial to appellants Ferrari and Darneille in the absence of a showing that the jury had seen the articles; in the absence

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[1]Appellants were each granted leave to proceed to prosecute appeal in forma pauperis (Tr. 79-86, 90). Appellants Knight and Darneille are proceeding in pro. per. but no brief has been filed by Appellant Knight at the time of preparation of appellee's brief.

of a motion for a mistrial on behalf of appellant Darneille; in the light of unobjected to instructions to the jury to disregard any newspaper account; and in the absence of any proper record setting forth the language of the account?

3. Was the testimony of rebuttal witness Gloria Davis properly admitted to impeach the credibility of appellant Ferrari after he had opened the door on direct examination by denying having possessed or seen narcotics during the period in question?

4. Was it error for the government to fail to produce a witness whose whereabouts were unknown?

5. Were appellants entitled to an instruction that an unfavorable inference might be drawn from nonproduction of evidence, when it had been shown that the evidence was not available and its absence had been explained?

6. (a) Was it error for the court to respond in writing to an inquiry in writing from the jury, when all counsel were available but not present, but had chosen co-counsel to represent them and were afforded opportunity to be present and to object to the instruction thus given?

(b) Was the supplemental instruction a correct statement of the law?

STATEMENT OF THE CASE.

Appellant Cherpakov does not question the sufficiency of the evidence to support his conviction

(Cherpakov Opening Brief, page 5). The sufficiency of the evidence is raised by appellants Ferrari (Ferrari Opening Br., pp. 7-10) and Darneille (Darneille Br., pp. 4-5).

Each appellant in his statement of the case has extracted only fragments of the testimony, and in order to aid this court in reviewing the sufficiency of the evidence, appellee deems it necessary to restate the evidence in more complete detail.

Clifford S. Hubach, a chemist for the United States Treasury Department in San Francisco, California, identified Exhibit 1, a paper bag with six rubber containers therein, as having been received by him from Agents Feldman and Wu on August 15, 1955 (Tr. 5-6). He analyzed the contents of the package and determined it contained 13 ounces and 6 grains of a narcotic drug (Tr. 6-9). Exhibits 2 and 3 each contained 400 grains of heroin (Tr. 10, 13) and Exhibit 4 contained 6 grains of heroin (Tr. 13-14).

William J. Gowans, a chemist for the United States Treasury Department, San Francisco, California, identified Exhibit 5 as containing 10 grains of heroin (Tr. 17-18), and Exhibit 6 as containing 437 grains of heroin (Tr. 18-19) and exhibit 7 as containing 365 grains of heroin (Tr. 19-20).

Ira Charles Feldman, an agent of the Federal Bureau of Narcotics, first met appellant Ferrari at Ciro's Bar, 645 Geary Street, San Francisco on July 6, 1955, where Ferrari was bartender (Tr. 21-23). During a conversation Feldman told Ferrari that he was an "investment broker" from the east; that he

"bought and sold things, small things, something I could put in my pocket, carry around, and turn over a fast buck." Ferrari replied that he knew what Feldman wanted, but things were pretty tight, and asked Feldman to return later (Tr. 24).

On July 8, 1955 at Ciro's Bar, Feldman was introduced by Ferrari to appellant Knight. (Tr. 25.)

On July 17, 1955 at Ciro's Bar, Feldman invited Ferrari to come up to his apartment and talk; he told Ferrari he thought they could make a deal. Ferrari was unable to make the visit that evening, but said he was sure within a few days he could come up and would be happy to talk to Feldman (Tr. 27-28).

On July 20, 1955 again at Ciro's Bar, Feldman met appellants Ferrari and Knight and invited them to his apartment. Ferrari said he couldn't make it, but that Knight could make it (Tr. 28-29). Later that evening Feldman was joined at the bar by Miss Janet Jones alias Janet Howard, a special employee of the Bureau of Narcotics. After further social conversation, Knight received the address and telephone number of Feldman's apartment, and said he would come to the apartment with his lady friend, Marie Hagler, after the bar was closed (Tr. 29-30).

On the early morning hours of July 21, 1955, at about 2:45 a.m., Knight and Miss Hagler arrived at Feldman's apartment. While Misses Jones and Hagler were absent from the room appellant Knight asked Feldman, "What do you want, black or white?" (Tr. 30-31). Feldman asked what he meant, and Knight replied, "Junk." (Tr. 31-34, 192.) Feldman testified

that in the narcotics trade the term "white" referred to heroin, "black" referred to opium, and "junk" was a term used to signify narcotics (Tr. 32-33). Knight cautioned that "stuff" was hard to get, and that because of the narcotic agents they had to be careful but that he would contact Feldman the next day (Tr. 32, 34). A further general discussion relative to narcotics and the situation in San Francisco was had when the women returned to the room (Tr. 33).

On the evening of July 22, 1955 Feldman again met appellants Knight and Ferrari at Ciro's bar, and was introduced by Ferrari to appellant "Bones" Darneille (Tr. 35-36, 92-93).[2] During a conversation, Ferrari accepted an invitation to go to Feldman's apartment after the bar was closed and took Feldman's address and telephone number (Tr. 36). Appellant Ferrari informed Feldman that Darneille and Miflin would attend the meeting, and Miflin, Darneille, Miss Jones and two females identified only as June and Jyrene, who were obtained at another location, thereafter proceeded to Feldman's apartment (Tr. 36-37). In the absence of the females a conversation was had between Feldman, Miflin and Darneille during which Darneille said he knew what Feldman did; that they could get together in a couple of days and make a "grand" apiece; that he had "connections" all over San Francisco and Dave (Miflin) had connections in

[2]Also present at this meeting was Dave Miflin, a defendant at the trial who was convicted by the jury, but as to whom a motion for judgment of acquittal was thereafter granted by the trial judge. Miflin did not testify at the trial.

Minneapolis and "Vegas"; that "we will get together and we will all make a buck." Darneille said that he "wouldn't move anything less than a pound and mostly kilos." (Tr. 38.)

During the conversation Feldman told Darneille that he had "made a pitch to a guy about narcotics" the night previous, and Darneille replied, "I know about the pitch. Red Knight told me." (Tr. 38-39.)

On the morning of July 23, 1955 Feldman received a telephone call from appellant Knight during which Knight said that "Bones still wanted to see me and deal with me," and a later telephone call the same morning to the effect that Bones was still thinking of him (Tr. 42).

On the evening of July 26, 1955 and morning of July 27, 1955 Feldman met appellant Darneille at Harold's Rebound Club, during which time he asked Darneille to come to his apartment so they could talk and straighten out the deal (Tr. 43, 112-113). Later at the apartment Darneille stated that he had fooled with narcotics for the last twenty five years, had smoked opium for 15 years, and had "kicked" the habit just three years ago. He said "Within a few days, Ike, we will have a deal," that they would all make money, and that there was nothing about "junk" he didn't know (Tr. 43-44, 114-115). Arrangements were made for another meeting at the Rebound Club that evening (Tr. 44-45).[3]

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[3]Ciro's Club was closed during this period by state authorities (Tr. 39-40; 42).

On the evening of July 27, 1955 at Harold's Rebound Club appellant Darneille introduced appellant Cherpakov to Feldman as "Jack Cherry" (Tr. 46). In a later conversation appellant Cherpakov said, "Ike, you are doing pretty good. You are here only a month and you are scoring already." When Feldman remarked that he hadn't "scored" yet, Cherpakov replied, "Well, don't worry, you are. You can't get any bigger than Red Ferrari. If you do right by Red, you will be O.K. If you do wrong by Red, you will end up in an alley." (Tr. 47.)

At Feldman's apartment later that night appellant Darneille told Feldman that it was o.k. the next day or two; that he would make $10,000; that Cherpakov would make $10,000 and that Feldman would make $100,000. Cherpakov said that he was ready right then; that he could come up with one hundred "pieces," but that he needed a reference. Feldman agreed to provide the reference the next day. During this same conversation Cherpakov commented that "Right now we are committing a conspiracy." (Tr. 49.)

On July 28, 1955 Feldman observed that Ciro's Bar was reopened, and he found appellants Ferrari, Cherpakov and Darneille present therein. Darneille informed him that they had a deal, and that it was all set in a day or so (Tr. 50, 125). After the departure of Cherpakov and Darneille from the bar, appellant Ferrari asked Feldman if he was going to do business with them and was informed by Feldman that he was (Tr. 51).

During the conversation with Cherpakov and pursuant to the previous arrangement, Feldman gave Cherpakov a paper on which was written the name, address and telephone number of a New York gangster, telling him that this was his reference. Cherpakov took the paper and said that he would "take you up, Ike." (R. 51.)

On July 29, 1955 there was further discussion at Ciro's between Feldman and Darneille, while Ferrari was tending bar, concerning a "deal" in a day or two (Tr. 52, 129). Again, on July 30, 1955 at Ciro's bar, Darneille told Feldman that the deal was ready any minute and to just hang on (Tr. 53).

Finally, on July 31, 1955, at Ciro's bar, while Ferrari was bartending, Darneille asked Feldman if he knew Charlie Garcia at the Macombo. Feldman replied that he had heard of him, and Darneille then said, "Go see him to get the junk." (Tr. 53.)

That same night, about 12:45 a.m., on the morning of August 1, 1955, Feldman introduced himself to Charles Garcia, Sr. at the Macombo Bar. Garcia had been expecting him; he knew where Feldman's apartment was before he was told; and he agreed to meet Feldman there as soon as the bar closed (Tr. 53-54, 142).

Approximately three a.m. on the morning of August 1, 1955 Charles Garcia, Sr. and another man whom he introduced as his brother Bob arrived at Feldman's apartment. Feldman subsequently identified the man named "Bob" as Charles Clarence Garcia, the son of Charles Garcia, Sr. At that time Feldman told them

that he had given them his references and showed them the money he had available. They agreed to return the following evening after checking with their friends as to what they could get and how much. Charles Garcia, Sr., said that "they wouldn't move for less than a pound or even a kilo." (Tr. 55-56.)

Charles Garcia told Feldman that appellant Ferrari was a "good guy" and that it was O.K. to deal with him (Tr. 56).

On August 2, 1955, about 9:30 p.m. the two Garcias returned to Feldman's apartment and said that they had contacted their associates and that they could get as much (narcotics) as Feldman wanted and whenever he wanted it; but that "my people" didn't want to get caught and were going to "take it easy." (Tr. 57.) Garcia, Sr., quoted a price of $450 an ounce, and Feldman made a counter offer of $400 an ounce and agreed to buy a kilo at that price. Garcia, Sr. then left to make a telephone call to determine if this was satisfactory, and returned about an hour later to state that he had "made a phone call and saw my people" and that the deal was O.K. for $400 an ounce; that only one pound would be obtained the first time and that if it was satisfactory they could start dealing in kilos (Tr. 58).

Feldman thereupon paid over to the Garcias the sum of $6400 in $100 bills (Tr. 59).

Thereafter, on the early morning of August 13, 1955 Feldman received delivery from Charles Clarence Garcia of 13 ounces, 365 grains of narcotics from cabin 25 of the Bayside Motel, San Francisco, Cali-

fornia. Feldman identified Exhibit 1 as the narcotics received by him on this occasion (Tr. 61-70).

On August 17, 1955 Feldman informed Charles Garcia, Sr. that the narcotics were of inferior quality (Tr. 71-73). On August 17, 1955, at Ciro's Bar, appellant Cherpakov told Feldman that it was "rough" the way he dealt in pound lots (Tr. 76) and later, on August 22, 1955 in the presence of appellant Darneille, Cherpakov expressed regret that the stuff wasn't any good and discussed the purchase of heroin at Juarez, Mexico for $100 an ounce and the expense of bringing it across the border (Tr. 77-78). On the same occasion, Cherpakov made further reference to the fact that Feldman had been in town only a month and had "scored" already and that "There's none bigger than Red Ferrari and Ciro's." (Tr. 80.) Feldman had not previously discussed with any appellant the quality or quantity of the narcotics delivered or the fact that such a purchase had been made (Tr. 73, 80-81).

Feldman also testified that on August 2, 1955, at the time the $6400 was delivered to the Garcias, he had told them that he had been under the impression that "Bones" Darneille was "Bones" Remmer. He did not thereafter mention this misunderstanding to anyone (Tr. 74-75, 110-112). On the evening of August 17, 1955 Feldman and appellant Ferrari had a conversation at which time Ferrari said he was sorry that there had been a misunderstanding and that "Bones" Darneille would be in Ciro's later and they could straighten it out (Tr. 73-75). Ferrari refused a dinner

invitation from Feldman, saying, "Look Ike, *I know what you are doing. I know who you are dealing with.* I don't know about your deals. I can't go out with you. Like I told you once before, I don't want no trouble, and we aren't going to have any trouble." (Tr. 75.)

Feldman thereafter identified Exhibits 2, 5 and 6 as being further quantities of heroin purchased at various times from Charles Garcia (Tr. 81-87).

On cross-examination Feldman testified that Marie Hagler, appellant Knight's girl friend, told him that Knight and appellant Ferrari were "behind the whole business" with reference to the $6400 sale of narcotics (Tr. 176-177, 205-206).

It was also developed for the first time on cross-examination that the apartment occupied by Feldman had been wired to record the conversations therein (Tr. 90, 160-163; 183; 187; 200-201), and that the listening devices had been monitored by other agents in an adjoining room. No demand was made by any defendant for the production of the tapes or recordings.

On redirect examination agent Feldman testified that the recordings had been used to prepare reports, and the records then reused with the result that the old conversation was erased as new conversation was recorded (Tr. 206-207). Testimony offered through Agent Milton Wu as to the conversations heard by him by means of the loudspeaking devices was rejected by the court upon objection by the defendants (Tr. 207-213; 229-230).

William H. Grady, an agent of the Federal Bureau of Narcotics, testified that on August 4, 1955 he had accompanied District Supervisor White to Ciro's Bar, and had a conversation with Ferrari concerning a letter (Exhibit 8) which had been received in the office of the Bureau of Narcotics to the effect that two men had approached Ferrari concerning narcotics, and that he was fearful they were attempting to involve him in the narcotics traffic (Tr. 217-219). Ferrari was certain that the men were talking about narcotics, not some other contraband (Tr. 220). Ferrari was furnished with Grady's telephone number and asked to call if the men returned (Tr. 220). Agent Feldman entered Ciro's Bar later that evening, but Grady was not contacted by Ferrari (Tr. 60-61, 221). Instead, Ferrari warned Feldman that the government was looking for him, and they had a drink together (Tr. 61).

Murrey C. Peck, manager of the Bayside Motel, identified the registration card reflecting rental of Cabin 25 for the morning of August 13, 1955 to a person driving an automobile with license B 77217 (Tr. 231-235; Ex. 9).

James H. Mulgannon, an agent of the Bureau of Narcotics, testified that he had previously observed appellant Ferrari driving a 1955 Ford Coupe with 1955 California license plates 1L46628, and that on October 5, 1955 he observed this automobile being driven by appellant Knight to the residence of defendant Charles Garcia (Tr. 235-237). Mulgannon was in Garcia's residence at the time, and he observed

Knight knock at the door and depart when there was no response, and he observed him driving past the house slowly about 45 minutes later (Tr. 238).

THE DEFENSE CASE.

Lester Darneille testified that he was commonly known as "Bones" and was employed as a waiter (Tr. 254-255). He had quite a few arrests for felonies, but some of them were reduced to misdemeanors and he was convicted in 1951 of possession of narcotics, and was presently on parole (Tr. 255-256).

He admitted meeting agent Feldman at Ciro's on July 22, 1955, although he knew him only as "Ike" (Tr. 258-260, 287). After several drinks he accompanied Agent Feldman, the girl known as Janet, and defendant Miflin to Feldman's apartment (Tr. 260-261), together with two girls who had been obtained enroute by Janet (Tr. 262). At the apartment there were more drinks and food served (Tr. 263). At one period, when only defendant Miflin, appellant Darneille and Feldman were present, Feldman said he wanted to get into some kind of business where he could make money (Tr. 264). Darneille denied any discussion relating to narcotics, and said he was intoxicated when he departed (Tr. 265-267).

Darneille had been addicted to narcotics for twenty years off and on, but not for the past five years (Tr. 267).

He next saw Feldman at Harold's Rebound Club, but was not certain of the date (Tr. 268). He was

drunk that night, and he again accompanied Feldman and Janet to the apartment (Tr. 268). There "could have been" a discussion of narcotics at that time (Tr. 268). He thought Feldman asked him how many ounces were in a kilo, and he said he didn't know (Tr. 269).

The following night he again met Feldman at Harold's Rebound Club by prior arrangement (Tr. 269). He was accompanied by appellant Cherpakov (Tr. 270). After Janet arrived they went to other bars and continued drinking, and later returned to Feldman's apartment in the early morning hours (Tr. 271-273). There was a discussion of narcotics in Feldman's apartment, during which Feldman said he was here from the east to buy narcotics (Tr. 273). Darneille denied the testimony of Feldman concerning this conversation (Tr. 274-275) and subsequent conversations in Ciro's concerning a "deal" but admitted seeing Feldman on those occasions (Tr. 275-277).

Appellant Darneille admitted knowing Charles Garcia, having met him in San Quentin (Tr. 278), and he had visited at Garcia's home in April or May a year ago (Tr. 278-279). He denied having told Feldman to see Garcia at the Macombo to get the "junk" (Tr. 280). He testified he had not seen Garcia from spring of 1955 to about September 11 or 12, 1955, when at an accidental street meeting Garcia informed him that he had sold "milk and sugar" to Feldman for $6500 (Tr. 283-285, 340-342).

About August 10, 1955, appellants Darneille and Cherpakov met the girl Janet Howard on the street and she informed them that Feldman was an agent

On cross-examination Darneille admitted that he had also used the given name Robert and the surname Thomas in connection with previous arrests to avoid family embarrassment (Tr. 293). From 1930 to 1950 he purchased and used opium, morphine and heroin (Tr. 294-295).

He was a regular customer of Ciro's Bar and had known appellant Ferrari since 1935 or 1936, and had been on intimate acquaintance to the extent of borrowing money during the past 18 months he had been out of the penitentiary (Tr. 295, 320-321). He also knew appellant Cherpakov for about a year, having met him at Ciro's (Tr. 295-296); and he had known appellant Knight for 10 or 15 years and most closely during the past 18 months at Ciro's (Tr. 296). He was once employed by defendant Miflin as a bartender and knew him since about 1940 (Tr. 296-297). He met Charles Garcia in 1952 in San Quentin (Tr. 297), and Charles Garcia, Jr. about a year ago (Tr. 298).

Darneille knew Janet Black[4] or Howard as a narcotics user, and had met her husband Jimmy Black, in the county jail while serving a sentence for possession of narcotics in 1950 (Tr. 299-300).

He admitted that at different times he had purchased narcotics in large quantities, such as contained in Exhibit 1 (Tr. 314); that he may have told Feldman that he "could write a book about the stuff" (Tr. 315), but denied conversation concerning sale of narcotics (Tr. 312-316).

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[4]Janet Jones is referred to at times as Janet Howard and Janet Black, and as Janice or Jan.

Appellant Darneille admitted that appellant Cherpakov had made a comment to the effect that they were then engaging in a conspiracy, but that it was in Feldman's absence from the room (Tr. 332).

Renaldo Ferrari admitted meeting agent Feldman while a bartender at Ciro's (Tr. 343-346). They had "the usual conversation a bartender has with a customer" (Tr. 344). Feldman said he was looking for some "fast money," and Ferrari informed him that conditions around town had been "very slow, very bad" (Tr. 346). Later Ferrari stated that the only discussion he had with Feldman relating to narcotics was on the occasion of the first meeting, and that on this occasion Feldman specifically told him he wished to invest in narcotics (Tr. 347-348, 381).

He denied introducing Feldman to appellant Knight (Tr. 348-349) or Darneille (Tr. 350) or that he sent either Knight or Darneille or Miflin or Cherpakov to Feldman's apartment (Tr. 352).

Ferrari admitted that after a conversation with his attorney, a letter (Exhibit 8) was written to Colonel White of the Bureau of Narcotics, and that he thereafter received a visit from Colonel White and Agent Grady (Tr. 356-359, 389-393). He further admitted that Feldman also returned to the bar the same day or the next day, and that he told Feldman that the federal agents had been there and for Feldman to stay away "because if you get in trouble, I will get in trouble" (Tr. 360). Thereafter Feldman returned to Ciro's five or six different times; they bet on fights, and talked about numerous things (Tr. 362A). Fer-

rari did not notify the Bureau of Narcotics about these visits, although he had been requested to do so (Tr. 368-369, 393-395).

Appellant Ferrari was acquainted with both Charles Garcia, and Charles Clarence Garcia, and the former had patronized Ciro's during the period of the conspiracy (Tr. 364-366, 384-385). He denied any agreement or understanding with any of the remaining defendants to engage in the narcotics traffic (Tr. 367).

Although he at first denied he had been known by any other than his true name (Tr. 343), Ferrari later corrected his testimony to state that he had also used the name Stewart Ramsey in connection with the leasing of a pair of flats (Tr. 370).

On cross-examination, appellant Ferrari admitted that prior to his employment as bartender at Ciro's he had made his living as a gambler, and that he had been convicted in the Federal District Court of violations of the narcotics laws for concealment of heroin in 1948 or 1949, and was sentenced to three years imprisonment (Tr. 374-376). He was also convicted of a felony in the State of California relating to narcotics (Tr. 376-377).

Appellant Ferrari denied ever having purchased or sold narcotics (Tr. 387-388). The last time he had possession of narcotics was in 1937, and he had not had possession within the past year and a half (Tr. 400-401). Persons known to him as having had traffic in narcotics frequented Ciro's during the period he was bartender there (Tr. 401-404).

Jack Cherpakov, also known as Jack Cherry, was convicted in 1942 of a felony violation of the Selective Service laws and was sentenced to imprisonment for two years (Tr. 404-405, 432). He had known appellant Darneille for about a year as a close friend (Tr. 405, 432-433), but was not so well acquainted with defendant Miflin (Tr. 405-406). He met appellant Ferrari in 1939, and had started frequenting Ciro's bar about a year ago, where he also met appellant Knight (Tr. 406-407). He was also acquainted with Charles Garcia and Charles Garcia, Jr. (Tr. 407).

On July 27, 1955, in company with appellant Darneille, he met Feldman at Harold's Rebound Club, and after visiting various other establishments the three men and two girls went to Feldman's apartment (Tr. 407-417, 433-437). At the apartment Feldman told of his underworld background, and Cherpakov heard Feldman ask Darneille how many ounces were in a kilo, and if he knew the prices (Tr. 417-418, 439). Although his testimony had not mentioned narcotics to this point, he testified that he then told Darneille that "they can get you for conspiracy if you talk about it, so don't talk about narcotics" (Tr. 418-443). Also, "How do you know that this place isn't bugged?" and "What do you know about Ike?" (Tr. 419-443).

The only other conversation relating to narcotics concerned the addiction of one of the girls (Tr. 418-420).

Either the next day or two days later, at Ciro's bar, Feldman handed Cherpakov a slip of paper which

contained a name and New York telephone number (Tr. 421-423, 448-449). Later, when he asked Feldman what the paper was for, Feldman told him it was so he could check on him (Feldman) (Tr. 423, 450). He denied having asked for a reference, or having called the telephone number (Tr. 422-423).

Cherpakov met Feldman on various subsequent occasions, and particularly on the 4th or 5th of August, 1955, when Feldman told him he was looking for the two Garcias (Tr. 424-425, 451-453), and later when Feldman told him he had "connected," which Cherpakov understood to mean that he had purchased narcotics (Tr. 425-426, 461-463). He denied having had any conversations with any of the co-defendants concerning narcotics, except the one in Feldman's apartment (Tr. 426).

Cherpakov at one time used narcotics beginning in 1939, but had not been a user since 1948 (Tr. 426, 441-442).

On cross-examination, Cherpakov stated that he had followed the occupation of gambler for the past seven years (Tr. 429-430). He admitted meeting Feldman on July 27, 1955 but denied any conversation thereafter concerning appellant Ferrari (Tr. 436-437). He also denied specifically the conversations testified to by Feldman in the apartment to the effect that he was ready with a hundred "pieces," that he needed a reference, or that Feldman could be "bumped" for $50 or $100 (Tr. 443-445) and denied later conversations with Feldman to the effect that he could purchase narcotics for $100 an ounce in Juarez or Mexicali (Tr. 463).

Marie Hagler, a friend of appellant Knight, who had first claimed to be his wife, testified to the visit on July 21, 1955 to Feldman's apartment with Knight (Tr. 466-473, 486-487). She admitted that narcotics had been discussed, but that Feldman had brought up the subject, and that appellant Knight had disclaimed any interest in the narcotics traffic (Tr. 472-473, 490-492). She also admitted that in October, 1955, Feldman had discussed with her the "deal he had put over with Mr. Garcia" and whether she had heard that Messrs. Knight and Ferrari were involved (Tr. 475-477).

Miss Hagler stated that Charles Garcia came frequently to the new restaurant she had opened, to give advice on the menu (Tr. 480-481, 502). After the restaurant was open for business, appellant Knight was an employee of Miss Hagler (Tr. 477-482, 487).

John Knight had known Ferrari since the middle thirties, and sometimes relieved him as bartender at Ciro's (Tr. 505, 534). He met Feldman at Ciro's Bar, and about two days later, about 4:00 a.m., went to Feldman's apartment with Miss Hagler (Tr. 505-508, 515). In the apartment kitchen Feldman spoke to him about investing his money in "junk" and Knight told him he didn't know what he was talking about (Tr. 516). Later in the living room Feldman again mentioned that he wanted to invest in "junk" and Knight said he didn't want to get involved in anything like that or associate with Feldman if that was his business (Tr. 519-520). Knight saw Feldman on numerous occasions thereafter at Ciro's (Tr. 521) and at Miss Hagler's restaurant (Tr. 525).

Appellant Knight admitted knowing Charles Garcia, and having been in his home on numerous occasions, but denied any conversation relating to narcotics (Tr. 526).

He also admitted having been convicted of a felony of concealing and facilitating the concealment of heroin in 1947 in violation of the Jones-Miller Act (Tr. 530-531). He was addicted to the use of narcotics for about 10 years (Tr. 531-532).

THE REBUTTAL.

Gloria Davis, a "call girl" and dope user, testified in rebuttal that she had known appellant Ferrari for about two years (Tr. 606-608, 617). About six months after meeting Ferrari she began purchasing heroin from him at Ciro's bar, in quantities of a "spoon," for which she paid $40.00 (Tr. 609-610, 613). The heroin was received directly from appellant Ferrari after a prior telephone call to ascertain if a supply was available. The code used was "I want to do the thing" (Tr. 610-611).

Appellant Ferrari passed the narcotics to Miss Davis by slipping it under a napkin on which a drink was placed at the rear of the bar (Tr. 615-616). On one occasion appellant Ferrari made Miss Davis a Christmas gift of a spoon of heroin (Tr. 616-617).

On rebuttal, appellant Ferrari denied knowing Miss Davis, and denied having sold her narcotics, having seen her, or having talked to her (Tr. 653-654).

STATUTES INVOLVED.

The statutes involved are set forth in the Appendix.

SUMMARY OF ARGUMENT.

I. THE EVIDENCE ADDUCED BY THE GOVERNMENT WAS MANIFESTLY SUFFICIENT TO SUPPORT THE VERDICT OF GUILTY AS TO APPELLANTS FERRARI AND DARNEILLE.

What appellants ask is that this court reweigh the evidence and accept as true their own version of the facts, without regard to their credibility. It is well settled that this court will review the evidence in the record in the light most favorable to the government, and so viewed, the evidence is overwhelming.

II. APPELLANTS FERRARI AND DARNEILLE HAVE FAILED TO PRESENT A PROPER RECORD TO ESTABLISH THE EXISTENCE OF PREJUDICIAL NEWSPAPER PUBLICITY.

There is no showing that any juror read the newspaper articles complained of, or that any juror was influenced thereby. Moreover, the jury was adequately instructed to ignore any newspaper publicity and appellants failed to except to the sufficiency of the instruction or to pose instructions of their own.

III. THE REBUTTAL TESTIMONY OF GLORIA DAVIS WAS PROPERLY ADMITTED TO IMPEACH THE CREDIBILITY OF APPELLANT FERRARI.

Appellant Ferrari opened the door on direct examination by denying having had in his possession and having seen narcotics within the past year and a half.

The rebuttal testimony that Gloria Davis had purchased narcotics from Ferrari within that period of time was admissible to impeach appellant's testimony, and the jury was properly instructed that it was admitted for that sole purpose.

IV. THE GOVERNMENT WAS UNDER NO OBLIGATION TO LOCATE JANET JONES AS A WITNESS FOR APPELLANT DARNEILLE.

There is no showing that the government knew of her whereabouts; that she could have testified to relevant or material matters, or that she was not equally available to the appellant as to the government.

V. AN INSTRUCTION TO THE EFFECT THAT THE JURY MIGHT DRAW AN INFERENCE FROM THE FAILURE TO PRODUCE STRONGER EVIDENCE WAS CORRECTLY REFUSED.

The evidence was not available; its absence was explained; and it would have been merely cumulative of evidence presented. Moreover, appellants have failed to comply with Rule 18 (2) (d) of this court in their briefs.

VI. (a) THE COURT'S RESPONSE TO A QUESTION PRESENTED BY THE JURY WAS PROPER, DESPITE THE ABSENCE OF COUNSEL FOR APPELLANTS CHERPAKOV AND DARNEILLE.

Appellants were tried together in one proceeding and the presence of counsel for appellant Ferrari, by selection of co-counsel, constituted notice and oppor-

tunity for presence of all counsel. They knew immediately of the nature of the jury's inquiry and of the court's response. Although opportunity existed to take exception, they failed to do so until days after the verdict.

(b) THE COURT'S RESPONSE TO THE JURY WAS A CORRECT STATEMENT OF THE LAW.

He informed the jury that the evidence was not available and not in evidence, and therefore they could not have it. To have instructed them on its admissibility in the event of its availability would have required a ruling upon a supposed or hypothetical state of facts. Abstract instructions, not based on the evidence of the case, would have been improper.

ARGUMENT.

I.

THE EVIDENCE WAS AMPLY SUFFICIENT TO SUPPORT THE VERDICT AS TO EACH APPELLANT.

Appellants Ferrari and Darneille contend that the evidence was insufficient to support the verdict of guilty as to them (Ferrari Br., pp. 7-10; Darneille Br., pp. 4-5). Appellee Cherpakov makes no such claim.

Appellant Ferrari was charged and convicted only of the offense of conspiring to violate the narcotics laws in count 16 of the indictment, and appellant Darneille was convicted of the substantive offense of violation of the Harrison Narcotic Act in count one, and

of conspiracy to violate the Harrison Narcotic Act and the Jones-Miller Act, as charged in count 16 (Tr. 3-16, 41-44). He was acquitted of the offense of violation of the Jones-Miller Act charged in count 2 of the indictment (Tr. 41).

Motions for judgment of acquittal were made on behalf of each appellant at the close of the Government's case in chief (Tr. 241-243), and again at the close of all the evidence in the case (Tr. 665), and were denied.

It is a well established principle that this court will indulge in all reasonable presumptions in support of the ruling of the trial court, and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F. 2d 681 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th);

Bell v. United States, 185 F. 2d 302, 308 (C.A. 4th);

Gendelman v. United States, 191 F. 2d 993 (C.A. 9th);

Barcott v. United States, 169 F. 2d 929, 931 (C.A. 9th) cert. denied 336 U.S. 912.

The proof in a criminal case need not exclude all possible doubt, but need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt.

Henderson v. United States, 143 F. 2d 681 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th).

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue. Wigmore on Evidence (3d ed. 1940), Vol. IX, Sec. 2497, p. 324.

An appellate court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial court.

Gage v. United States, 167 F.2d 122, 124 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F.2d 375 (C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 254;

Gendelman v. United States, 191 F.2d 993 (C.A. 9th);

C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489, 491 (C.A. 9th).

Despite these well settled principles of appellate review, the statements of facts and the arguments of appellants are little more than fragmentary extracts of the evidence as it applied to them individually. Appellants completely ignore the facts that the object of the conspiracy was consummated by the sale of over 13 ounces of narcotics by the co-defendants Charles Garcia, Sr. and Charles Clarence Garcia, who pleaded guilty to the conspiracy charges; and by various subsequent sales of lesser amounts of narcotics.

In most cases, the proof of the agreement is the evidence of what the conspirators did in execution of such agreement.

Culp v. United States, 131 F.2d 93 (C.A. 8th);
Devoe v. United States, 103 F.2d 584 (C.A. 8th) certiorari denied 308 U.S. 571;
Jelke v. United States, 255 Fed. 264 (C.A. 7th).

The evidence here clearly demonstrated the concert of action and community of purpose of the various conspirators. They were well acquainted with each other by their own admissions; they were intimately familiar with the narcotics traffic, having been without exception either users of narcotics or convicted peddlers; they admitted having discussed narcotics with Feldman, although they cast the conversations in a different and more innocent mold; there was ample evidence that each was aware of the discussions had by others with Feldman concerning narcotics, when they were not personally present; and they were aware when Feldman finally "scored."

The chain of circumstances began with the conversation between Feldman and Ferrari at Ciro's bar, when Feldman introduced himself as an "investment broker" who bought and sold small things he could carry in his pocket. Ferrari knew what Feldman wanted, although the words used to refer to narcotics were not actually expressed.[5] At Ferrari's instructions, Knight visited Feldman's apartment and determined that Feldman was in the market for "white," a slang expression for heroin (Tr. 24-33).

Two weeks later Ferrari introduced Feldman to appellant Darneille who also visited Feldman's apartment, and told him that they wouldn't deal in anything less than a pound, and mostly kilos (Tr. 38). This was the same language used by Charles Garcia on the occasion of his first visit to the apartment (Tr. 55-56). Darneille knew of the previous night's discussion with appellant Knight at which Knight had agreed to contact Feldman the next day concerning a proposed deal (Tr. 38-39). On various occasions thereafter, Knight assured Feldman that "Bones" [Darneille] still wanted to make a deal (Tr. 42).[6]

Darneille and Feldman had further discussions on July 26, 27, 28 and 29, at which times the proposed

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[5]Ferrari first testified that this conversation was the usual conversation a bartender has with a customer, but later that Feldman had specifically told him he wished to invest in narcotics (Tr. 344-346; 347-348; 379-381).

[6]In the light of the past experience of the conspirators in the narcotics traffic, it may be assumed that appellant Ferrari's purpose in sending them to Feldman's apartment was to provide an opportunity to observe him and determine if he was a bona fide purchaser or a federal or state agent.

deal was discussed, and finally on July 31, 1955 Darneille directed Feldman to Charles Garcia to "get the junk" (Tr. 43-53). During the course of these conversations, particularly on July 27, 1955, appellant Cherpakov entered into the arrangements, in company with Darneille, and requested a reference from Feldman (Tr. 49). He assured Feldman that he (Feldman) was "scoring already" despite having been in town less than a month, and that Feldman couldn't get any bigger than Red Ferrari, but that "if you do wrong by Red, you will end up in an alley" (Tr. 47). Feldman had met Cherpakov for the first time on the evening of this conversation (Tr. 46) and there is nothing in the record to show that he had reason to know from Feldman how long he had been in town; that Feldman was acquainted with Ferrari, or that Feldman had discussed narcotics with any of the other members of the conspiracy.

Ferrari's familiarity with the negotiations was further established when, on July 28, 1955, after Feldman had further conversation with Darneille and Cherpakov concerning the "deal," Ferrari asked if he was going to do business with them (Tr. 51).

On August 3, 1955, the day following the payment of $6400 to the Garcias, Ferrari caused his attorney to write a letter to the Bureau of Narcotics (Ex. 8) reporting Feldman's apparent connection with the narcotics traffic. Although requested the following day to inform the agents of the Bureau of Narcotics if Feldman returned to Ciro's, Ferrari admitted that he had not done so, despite Feldman's visit a few hours

later that evening (Tr. 217-225, 391-396). To the contrary, he warned Feldman that the federal agents were looking for him (Tr. 394).

Inasmuch as Janet Howard, or Janet Jones, had allegedly informed Cherpakov and Darneille that Feldman was an agent, the probable purpose of this letter was either to ascertain the truth of that information or to prepare an alibi in the event Ferrari was later charged in connection with the conspiracy then too far under way to withdraw from (Tr. 288-289). Feldman testified that the last day Miss Howard was in the employ of the Bureau of Narcotics was August 1, 1955 (Tr. 168). Appellant Darneille's testimony was that the conversation with Miss Howard was August 10, 1955 (Tr. 285), but this conflicts with his later comment that it occurred on the day she had moved out of the apartment (which was fixed at August 1, 1955) (Tr. 288, line 9).

Furthermore, Ferrari admitted knowledge of the conspiracy on August 17, 1955 in a conversation with Feldman which is only partially set forth in appellant's brief (Br., p. 6). The omitted portion of that conversation is most incriminating. In full Ferrari said, "Look, Ike, I know what you are doing. I know who you are dealing with. I don't know about your deals. I can't go out with you. Like I told you once before, I don't want no trouble, and we aren't going to have any trouble" (Tr. 75).

Feldman had been under the impression that appellant Darneille (known to him only as "Bones") was "Bones" Remmer, and after learning of this error he

first mentioned it on August 2, 1955 to the Garcias at the time he paid over the $6400 (Tr. 74-75, 110-112). Feldman did not mention the misunderstanding to anyone thereafter, but on August 17 the subject was raised by Ferrari who said he was sorry about the misunderstanding; that "Bones" would be in later, and they could straighten it out (Tr. 73-75). The clear import of this testimony is that Ferrari was in contact with the Garcias subsequent to the receipt of the money for the sale of narcotics.

Likewise, although Feldman told only Charles Garcia, Sr. that the narcotics were of inferior quality, he was approached by Cherpakov and Darneille several days later, and they expressed regret that the "stuff" was no good (Tr. 71-73, 77).

Each of the appellants took the stand in his own defense, and each admitted substantially all of the meetings and conversations with agent Feldman, including the use of certain language quoted by Feldman, but each recounted his own version of the discussions and denied any agreements with Feldman or each other to violate the narcotic laws. At best, the defense testimony placed in issue the credibility of the witnesses. The jury had an opportunity to observe their demeanor on the stand; and to consider and weigh the substance of the testimony, with the result that they rejected the appellants' versions of the occurrences. It is not the function of this court to reweigh the evidence or reconsider the credibility of the witnesses. This court has stated the rule to be as follows:

"It is not for us to say that the evidence was insufficient because we, or any of us, believe that inferences inconsistent with guilt may be drawn from it. To say that would make us triers of the fact. We may say that the evidence is insufficient to sustain the verdict only if we can conclude *as a matter of law* that reasonable minds, as triers of the fact, must be in agreement that reasonable hypotheses other than guilt could be drawn from the evidence. *Curley v. U.S.,* 81 US App. D.C. 229, 160 F.2d 229, 230. In the cited case, Judge Prettyman pertinently observes:

'If the judge were to direct acquittal whenever in his opinion the evidence failed to exclude every hypothesis but that of guilt, he would preempt the functions of the jury. Under such rule, the judge would have to be convinced of guilt beyond peradventure of doubt before the jury would be permitted to consider the case.' 160 F.2d at page 233. See also *U.S. v. Perillo* (2d Cir.), 164 F.2d 645."

Stopelli v. United States, 183 F.2d 391, 393.

Evidence of a conspiracy is, of course, to be considered as a whole — not piecemeal. *United States v. Valenti,* 134 F.2d 362, 365 (C.A. 2d). Taken as a whole, the evidence here established the existence of an unlawful agreement, the accomplished purpose of which was to traffic in narcotics in violation of the applicable statutes; it established the commission of numerous overt acts on the part of each member of the conspiracy in furtherance of the objects of the conspiracy; it establishes a common purpose and design and mutual understanding among the conspirators to deal in narcotics. In short, the evidence was sufficient to sustain the verdict.

II.

THERE WAS NO ABUSE OF DISCRETION IN DENIAL OF MOTIONS FOR A MISTRIAL ON GROUNDS OF ADVERSE NEWSPAPER PUBLICITY.

Appellants Ferrari and Darneille contend that they were denied a fair trial because of newspaper publicity (Ferrari Br., 10-14; Darneille Br., 5-6). With the exception of short excerpts (Tr. 604-605) there is nothing in the record before this court to support the accusations of prejudicial newspaper accounts or the more serious implied accusation of misconduct on the part of the prosecutor (Ferrari Br., pp. 13-14).

The argument of appellant Ferrari is only incidentally based upon the record; that of appellant Darneille has no foundation in the record whatsoever. Moreover, only appellant Ferrari moved for a mistrial on the ground of the alleged prejudicial publicity, the remaining four defendants remaining silent (Tr. 604-605). Nor did appellant request that the jury be examined on *voir dire* to determine if they had read the newspaper articles, and, if so, whether they had been prejudiced thereby.

Appellants blandly invite this court to accept their unsupported assertions of prejudice to establish reversible error. This is not enough. Appellants have the burden of showing prejudice from a juror's reading of an inflammatory newspaper article, even after it is established that the article came to the attention of the juror.

United States v. Carruthers, 152 F.2d 512, 518 (C.A. 7, 1945) cert. denied 327 U.S. 787.

Appellants have failed to establish in the case at bar that any juror even saw the articles, much less that they were prejudiced thereby.

Appellant Ferrari further complains that the effect of the articles upon the jury was not removed by any admonition to the jury during the course of the trial or prior to its commencement. The record of proceedings on *voir dire* during the selection of the jury is not before this court, and appellant goes outside the record in stating that no admonition was given prior to the commencement of the trial. However, in any event, failure to tell the jury not to read newspapers or listen to the radio is not grounds for reversal in the absence of proof that any member of the jury saw or heard the stories mentioned.

> *United States v. Griffin,* 176 F.2d 727, 731 (C.A. 3, 1949).

As Mr. Justice Holmes said in *Holt v. United States,* 218 U.S. 245, 251:

> "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

The jury was correctly instructed to disregard any newspaper account, or radio or television publicity, and to try the case solely upon the evidence as it was presented in court (Tr. 700). Appellants did not complain of the instruction when given, in compliance with Rule 30, Federal Rules of Criminal Procedure, and submitted no alternative instruction.

A motion for a mistrial on grounds of inflammatory publicity is directed to the sound discretion of the trial court, and the burden is on the defendant to show an abuse of discretion and prejudice to him. *United States v. Carruthers,* supra. Having failed to support the burden, the motion was properly denied below.

The cases cited by appellant Ferrari are not dispositive of the issue. *Briggs v. United States,* 221 F. 2d 636 (C.A. 6, 1955) was decided on the lack of instruction to the jury to disregard newspaper articles; and *Marson v. United States,* 203 F.2d 904 (C.A. 6, 1953) related to examination of jurors on *voir dire* and to newspaper accounts characterizing the defendants as "notorious hoodlums," "holders of long police records" and referring to previous arrest of one for kidnapping. The court was there asked to interrogate jurors concerning the articles, but the record failed to show that he had done so.

Although counsel for appellant Ferrari has included what purport to be typewritten copies of objectionable newspaper stories as Appendix A, to his brief, he did not make them a part of the record of the court below, and they should be disregarded.[7] In his brief, appellant Ferrari goes further outside the record to characterize the newspaper coverage of the trial as "big news" which was "screamed" with "little bits of color," from the arrest in February to the trial in

[7]Even if considered by the Court, it is obvious that they are not prejudicial to appellant Ferrari since they report only what was subsequently brought out during the trial of the case; and it is difficult to imagine how they might be prejudicial to appellant Darneille since he is not even mentioned therein.

April, 1956. Moreover, from a quotation in the San Francisco News article of April 28, 1956 that the testimony of Gloria Davis was termed "vital" to the government's case, he infers that the prosecutor deliberately used "daily newspapers as a propaganda medium for the purpose of securing a conviction based upon prejudice" (Br. 12, line 6 and page 14, lines 17-19).

Appellee need not depart from the record to demonstrate the fallacy of this inference. The quotation attributed to the prosecutor was not his, but the trial judge's (Tr. 595-596):

> "The Court. Mr. Lockley, I am willing to grant you a continuance if, as I apprehend, the testimony of your witness is vital to the case—is it?
>
> Mr. Lockley. I think it is, Your Honor."

Inasmuch as the colloquy took place in the presence of the jury it is unlikely that its subsequent publication would tend to prejudice the appellants, even assuming the article came to the attention of a juror.

III.

THE TESTIMONY OF THE WITNESS GLORIA DAVIS WAS PROPERLY ADMITTED TO IMPEACH APPELLANT FERRARI.

Appellant Ferrari complains that the testimony of Gloria Davis was improperly admitted, over objection, as impeachment on a collateral issue.[8]

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[8]Appellant has failed to comply with Rule 18(2)(d) of this court requiring his specification of error to quote the grounds

Appellant poses, but does not press, several grounds upon which he suggests the testimony of the witness might be attacked (Ferrari Br. 15). The thrust of his argument appears, however, to be that it constitutes impeachment on a collateral issue and not proper rebuttal (Br. 16). He mistakenly states that the issue of whether appellant Ferrari had ever sold any narcotics "was raised for the first time on cross-examination, apparently for the purpose of impeachment" (Ferrari Br. 15; Tr. 387). This is not the case. Appellant opened up the subject on direct examination, when the last question put to him by his counsel was (Tr. 373):

> "Q. Have you had in your possession or have you seen within the last year, year and a half, Mr. Ferrari, any narcotics whatsoever?
>
> A. None whatsoever."

On cross-examination appellant Ferrari denied having purchased narcotics; having sold narcotics; and admitted he had transported narcotics, but "didn't know it was there" (Tr. 387-388).

In rebuttal, the witness Gloria Davis testified that during the past year and a half she had purchased and received from Ferrari's own hand a quantity of

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urged at the trial for the objection to admission of evidence, and the full substance of the evidence admitted, with reference to the page number in the transcript where the same may be found. The court is not, therefore, required to consider this specification. *Lee v. United States,* No. 15,039, decided October 24, 1956 (C.C.A. 9); citing *Ziegler v. United States,* 9 Cir. 174 F.2d 439; *Mosca v. United States,* 9th Cir. 174 F.2d 448; *DuVerney v. United States,* 9 Cir. 181 F.2d 853; *Lii v. United States,* 9 Cir., 198 F.2d 109; *Cly v. United States,* 9 Cir. 201 F.2d 806; *Gordon v. United States,* 9 Cir. 202 F.2d 596.

heroin on various occasions (Tr. 609-617), thus contradicting his testimony and placing his credibility in issue.

Appellant relies on *Stansbury v. United States,* 219 F.2d 165 (C.A. 5, 1955), a prosecution for violation of the Marihuana Tax Act. The objectionable collateral matters used to impeach appellant in the cited case related to whether he had fathered an illegitimate child; had taken out a federal wagering stamp and had engaged in a policy wheel, and were clearly immaterial to the issues of the case. The court distinguishes the case from *Walder v. United States,* 347 U.S. 62 which is clearly controlling here.

In the *Walder* case the petitioner testified on direct examination that he had never sold narcotics to anyone in his life; nor had them in his possession; nor handed or given them to anyone; or acted as a conduit in passing narcotics from one person to another. He repeated the assertions on cross-examination, and the government called as a rebuttal witness one of its agents who had participated in an unlawful search and seizure during which narcotics were taken from petitioner's home and presence two years before. The jury was instructed that the evidence was admitted solely for the purpose of impeaching the defendant's credibility.

The sole question before the Supreme Court was whether the defendant's assertion on direct examination that he had never possessed narcotics opened the door, solely for the purpose of attacking his credibility, to evidence of the heroin unlawfully seized and

previously suppressed as evidence. The judgment was affirmed.

In the language of Justice Frankfurter:

> "Of his own accord, the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics. Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore, not available for its case in chief. Beyond that, however, there is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility" (at p. 65).

Likewise, the court below carefully instructed the jury on the purpose of the admission of Gloria Davis' testimony as follows:

> "You are instructed that the testimony of Gloria Davis does not relate to the guilt or innocence of any of the defendants.
>
> "Mrs. Davis' testimony was admitted for one purpose, and one purpose only, that is, to impeach the testimony of the defendant Ferrari and the only effect that such testimony can have is to assist you in determining the credibility of the defendant Renaldo Ferrari." (Tr. 692.)

See also *Dowling Bros. Distilling Co. v. United States,* 153 F.2d 353 (C.A. 6th) where a defendant had testi-

fied on cross-examination that he had never sold any whiskey over ceiling price. The court held it was proper for the government to offer testimony as to overpayment made to defendant under circumstances similar to those charged in the indictment, because it went to his credibility.

IV.

APPELLANT DARNEILLE WAS NOT DENIED THE RIGHT TO SUBPOENA WITNESSES.

Janet Jones or Janet Howard, a special employee of the Bureau of Narcotics, was assigned to accompany agent Feldman during his investigation and give him "color" (Tr. 154-159). At the time of the trial agent Feldman had not seen her for six months, and did not know her whereabouts (Tr. 102, 148-149). She ceased to assist the Bureau of Narcotics on August 1, 1955 (Tr. 168).

A subpoena was issued for Miss Jones to appear as a witness for the defense (Ex. A). Service of the subpoena was attempted by leaving a copy with George White, head of the Bureau of Narcotics in San Francisco.[9] At that time the defense was informed that Mr. White had no idea of Miss Jones' whereabouts (Tr. 569-570). No showing was made of any further

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[9]The record fails to show the tender of the fee for one day's attendance and mileage allowed by law pursuant to Rule 17(d) Federal Rules of Criminal Procedure.

attempts to locate and serve the witness, or that the government or its agents had knowledge of Miss Jones' whereabouts at the time of trial or for any period of time after she left the employ of the Bureau of Narcotics.

Appellant Darneille alleges that the government's failure to produce Miss Jones at the trial deprived him of his constitutional right to have compulsory process for producing witnesses in his favor (Darneille Br. 6).

Rule 17 (d) provides in part:

> "Service of subpoena shall be made by delivering a copy thereof to the person named. . . ."

The rule is not complied with by delivery of the subpoena to a former employer, or acquaintance, or leaving a copy at the last place of employment or residence of the witness. There is no showing that the witness was not available if the appellant had searched for her, or that any search was, in fact, made.

Moreover, there is no showing that the testimony of the witness was either material or necessary. Appellee assumes that she would have testified favorably to him concerning the substance of conversations had in her presence relating to narcotics. If so, the testimony would have been merely cumulative, for appellee testified to his version of the same conversations.

Appellee has found no reported cases in which it has been held that the government is under any obligation to search for and produce witnesses, absent a showing that the witness was made unavailable at the trial

through the suggestion, procurement, act or negligence of the government. Cf. *Motes v. United States,* 178 U.S. 458, 471; *Dear Check Quong v. United States,* 160 F.2d 251 (C.A.D.C. 1947).

To the contrary,

> "Appellant must plead and prove his own case and is responsible for the production in court of witnesses necessary to do so."
>
> *Thomas v. United States,* 158 F.2d 97 (C.A. D.C.), certiorari denied 331 U.S. 882.

> "We know of no rule which holds it error for the government to fail to put on the stand a witness, not deemed necessary to its case, who might conceivably have given testimony favorable to the defendant. It is for the defendant to make his own defense."
>
> *Deaver v. United States,* 155 F.2d 740 (C.A. D.C.) certiorari denied, 329 U.S. 766.

V.

THE COURT'S INSTRUCTIONS WERE COMPLETE AND CORRECT.

Appellants severally complain of the refusal of the court to give an instruction to the effect that upon failure of a party to produce stronger or more satisfactory evidence available to it, the jury might infer that such evidence would be adverse to that party (Ferrari Br. 19-22), (Cherpakov Br. 7-8) (Darneille Br. pages 1-2 to Appendix A).

The record fails to show that appellant Darneille submitted any proposed instructions, and in any event he failed to object to the instructions given.

Rule 30 Federal Rules of Criminal Procedure;
Bateman v. United States, 212 F.2d 61 (C.A. 9th, 1954);
Herzog v. United States, 226 F.2d 561, rehearing 235 F.2d 665, certiorari denied.

Appellant Ferrari objected to the failure to give his requested instructions Nos. 9 and 12, but failed to state any ground for the objection (Tr. 694-695). He does not set forth in his brief the language of the rejected instructions in compliance with Rule 18 (2) (d) of this court (Ferrari Br. 19-22) and they are not to be found in the record on appeal.[10]

Appellant Cherpakov sets forth in his brief the language of the instruction proposed by him and rejected by the court (Cherpakov Br. 7). He does not set out the grounds of the objection urged at the trial, nor did he state any grounds at the time of his objection (Tr. 694-695).

Appellant Cherpakov relates his requested instruction to the failure to produce certain recordings made of conversations in Feldman's apartment by means of electronic devices consisting of microphones concealed

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[10]In part, Rule 18(2)(d) of this court provides: "When the error alleged is to the charge of the court, the specification shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial." See *Benatar v. United States,* 209 F.2d 734 (CA 9th), *Bateman v. United States,* 212 F.2d 61 (CA 9th), *D'Aquino v. United States,* 192 F.2d 338, 356 (C.A. 9th).

in the apartment, and recording equipment in a nearby room (Cherpakov Br. 7-8). Appellant Ferrari relates his requested instructions to the failure of the prosecution to produce both the recordings of the conversations, and the witness Janet Jones (Ferrari Br. 19-22).

It has already been demonstrated (Point IV, supra) that the witness Janet Jones was not available to the government; that her whereabouts were not known; and that she was equally available to the defense as to the prosecution. Moreover, the record fails to disclose that she could have shed any light upon conversations with appellant Ferrari or that she had any knowledge concerning his participation in the conspiracy. She received no instructions except to accompany Agent Feldman, and she did not need to know what he wanted or what he was looking for (Tr. 159). Had she been called as a witness there is nothing to show that she had testimony of relevant or material matters concerning appellant Ferrari.

Testimony of agent Feldman that the apartment was equipped with listening and recording devices was first brought out in cross-examination (Tr. 90, 160-163, 183, 187, 200-201). No demands were made by the appellants for the production of the recordings. On redirect examination Agent Feldman testified that the recordings were taken each morning to his office and there used by the agents to make their official daily reports. The recordings were then reused, and in so doing the old conversation was erased and the new conversation recorded (Tr. 206-207). Testimony of

narcotics agent Wu that he had overheard conversations in the apartment by means of the listening devices was objected to, and excluded by the court (Tr. 207-213).

The unfavorable inference from non-production of evidence arises only if it is within the power of the person against whom the inference arises to produce the evidence. This is mentioned or assumed in almost all the cases. *Wigmore Evidence, Vol. II, 3rd Ed., Sec. 286.* In any event, the party affected by the inference may, of course, explain it away by showing circumstances which would otherwise account for his failure to produce. *Wigmore,* supra, Sec. 290 (3). Finally, the inference can arise only where the evidence was such that it could have been used if produced; and it is obvious that the inference is not available for non-production or spoliation where the evidence would have been inadmissible or unnecessary or useless. *Wigmore,* supra, Sec. 291 (4).

This court in *Remmer v. United States,* 205 F.2d 277[11] held that in a situation where the government had custody of books and records of defendant, but failed to introduce all of them in evidence, the defendant was not entitled to an instruction as to a possible inference to be drawn from such failure to produce. And a similar instruction given in *Moyer v. United States,* 78 F.2d 624 (C.A. 9th, 1935) was held prejudicial error in the circumstances of that case.

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[11]Vacated 347 U.S. 227, rehearing granted 348 U.S. 904, reaffirmed 222 F.2d 720, remanded for new trial 350 U.S. 377.

The situation here is closely parallel to that in *United States v. LaRocca,* 224 F.2d 859 (C.A. 2d 1955) wherein the defendant, on trial on narcotics charges, requested an instruction that the failure of the government to call as a witness a party who had aided in establishing contact between the defendant and arresting officers would justify an inference that his testimony would have been unfavorable to the prosecution. The court held that the request was properly denied.

Likewise, in *United States v. Antonelli Fireworks Company,* 155 F.2d 631 (C.A. 2, 1946) certiorari denied 329 U.S. 742, the rejection of a charge that the jury might draw an inference against the United States for its failure to call witnesses under subpoena by it was held proper. The court pointed out that the testimony would have been merely cumulative, as would the recordings be cumulative of the testimony of the witness Feldman in the case at bar. Moreover, the defense had laid a foundation for the claim that the witnesses in the *Antonelli Fireworks Company* case were not equally available to it because of alleged intimidation by FBI agents.

See also

Dear Check Quong v. United States, 160 F.2d 251, 253 (C.A.D.C. 1947).

The fact that the recordings were erased when the tapes were reused does not lend support to the appellant's claim that the prosecution wilfully, knowingly, and purposely caused their destruction and suppres-

sion. This was Agent Feldman's first narcotics investigation (Tr. 171). The investigation extended over a period of approximately eight months (Tr. 151). While it may be argued that the better choice would have been to preserve the recordings made during the whole period of time, the fact of their unavailability under the circumstances explained away any presumption or inference which appellants seek to draw. Evidence is sometimes lost through mischance, accident, mistake or even neglect, but mere unavailability alone does not provide the opposing party with the weapon of unfavorable inference. In *Woolard v. District of Columbia,* 62 Atl. 2d 680, a prosecution for drunken driving, a witness testified that a urinalysis test had been made, but did not testify as to the result thereof. Evidence was then adduced that the specimen of urine had been lost. The court held that it was proper to decline an instruction as to the failure to produce what was not available. The identical principle controls here.

The court properly rejected the proposed instructions on the showing that it was impossible to produce the recordings; that the failure to produce had been explained away by the prosecution; and that the evidence would have been merely cumulative of testimony already in the record.

Cases cited by appellant Cherpakov are distinguishable. *Morei v. United States,* 127 F.2d 827, does not relate to instructions. Moreover, the failure to produce evidence in that case went unexplained. *U. S. Fidelity and Guaranty Co. v. Leong Dung Dye,* 52 F.2d 567

(C.A. 9th) appears to have no relevancy to the point in issue. *Hodgskin v. United States,* 279 F. 85 (C.A. 2) and *United States v. Dunne,* 99 F. Supp. 196 (E.D. Pa.) relate to the admissibility of evidence of destruction of records as showing a consciousness of guilt, but they do not discuss instructions of the nature here in issue. *United States v. Walker,* 152 F.2d 612 adverts to the failure of the party to explain the non-production of evidence available to him.

VI.

THE COURT'S RESPONSE TO A QUESTION PRESENTED BY THE JURY WAS PROPER.

Appellant Cherpakov in his "Appellant's Contentions" I and III (Cherpakov Br. 2, 6-7, 8-10) complains that the trial judge improperly communicated with the jury without notice to counsel and outside the presence of the defendant, and that the supplementary instruction thus communicated was erroneous. Appellant Darneille raises the same questions in his "Argument of Points Raised on Appeal" Nos. 3 and 4 (Darneille Br. 6 et seq.). Both questions will be dealt with under this heading.

(a) Appellants' initial contention appears to be that the court's written communication to the jury, in response to a note, deprived them of due process of law because given without notice to counsel and without affording an opportunity to be present.

The only record before this court consists of a stipulation augmenting record on appeal entered into

between counsel for appellants Ferrari and Cherpakov and the government, unless the affidavits filed by appellant Cherpakov in connection with his motion for a new trial are considered to be a proper part of the record (R. 45-49, 56-57)[12]

Assuming, arguendo, that the affidavits correctly set forth the occurrence, it is clear that each counsel was immediately informed of the communications and was not deprived of an opportunity to except to the instruction immediately thereafter if he had cared to do so. Counsel admits that on May 2, 1956 he was present immediately outside the courtroom; that he and associate counsel agreed that Harry P. Glassman, attorney for appellant Ferrari, would appear for all defendants; and that he was immediately informed by attorney Glassman of the nature of the jury's inquiry and of the court's response. (R. 46). Counsel took no exception to the instruction of the court as required by Rule 30, Federal Rules of Criminal Procedure, unless his motion for a new trial made six days later on May 8, 1956, after the verdict had been returned, may be construed as a timely exception (R. 58). Although attorney Glassman's affidavit is to the effect

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[12]Appellants, with the exception of appellant Ferrari, have failed to designate any portion of the record below; notwithstanding which the clerk has included the motion and affidavits of appellant Cherpakov for a new trial. Nothing further in connection with the alleged occurrence in chambers is before this court, and appellee filed no counter designation of the record for the reason that it was never served with a copy of appellant's designation. If this court sees fit to rely upon the affidavits thus presented, it should be noted that affidavits, even uncontroverted, are not proof of the facts. *Glasser v. United States,* 315 U.S. 60; *Holmgren v. United States,* 217 U.S. 509, 521.

that the court's response was "over affiant's objections," it is not indicated what was the ground for the objections, nor does the record further disclose the proceedings in chambers.

The five defendants on trial were presented by five separate counsel; the record discloses that it was not uncommon for one counsel to speak for all defendants where their interests were mutually involved.[13] It is clear that appellant Cherpakov was represented by attorney Glassman in connection with the proceedings in chambers, and that there was no conflict of interest which would have prevented attorney Glassman from acting on behalf of all defendants. It is not unreasonable to assume that the court likewise was misled into the belief that all appellants were represented in the person of attorney Glassman, and there is no allegation that the court was informed otherwise. Undoubtedly, had counsel indicated that he was not representing all defendants the court would have called them into chambers. Like the record, appellant was silent until the motion for a new trial for the first time called to the court's attention the contention that he had been deprived of due process.

The situation here is distinguishable from that in *Fillippon v. Albion Vein Slate Co.,* 250 U.S. 76, upon which appellant relies. The communication involved there was made without any notice to any counsel, and moreover, it was an incorrect charge. Further, appel-

[13]For example, all appellants now rely on the affidavits submitted only by appellant Cherpakov in the motion for a new trial.

lant excepted at the first opportunity to the charge given. Appellant here concededly had notice and opportunity and did not except until five days after the guilty verdict had been returned. Having invited the alleged error he has thereby waived the right to complain.

Shields v. United States, 273 U.S. 583, is likewise different on its facts. Counsel there was not informed of the communication between court and jury and had no knowledge of it until two months later. This is clearly distinguishable from the case at bar where appellant concedes he was informed immediately of the communications and took no steps to object to the manner of substances of the reply.

If the jury had been recalled and the charge read to them in appellant's presence, no different result can be supposed. Not every communication in the constrained absence of the accused necessarily requires a new trial. *Outlaw v. United States,* 81 F. 2d 805, 809 (CA 3rd 1936).

In *United States v. Compagna,* 146 F. 2d 524 (CA 2d, 1944) the trial judge stopped in the jury room to inquire as to what they meant by a note addressed to him. In affirming the conviction, Judge Learned Hand said,

> "But like other rules for the conduct of trials, it is not an end in itself; and, while lapses should be closely scrutinized, when it appears with certainty that no harm has been done, it would be the merest pedantry to insist upon procedural regularity (citing cases). There cannot be the slightest

doubt here that the informality—for, at most, it was no more—did not prejudice the accused." (Page 528.)

There appears to have been no attempt to have evidence taken to determine the circumstances surrounding the giving of the supplemental instruction by the court at the time of the motion for a new trial. Appellants thus invite this court to speculate as to the facts, or to accept their version of the occurrence and the conclusions to be drawn. Even so, they have failed to show any prejudice resulting from the action of the trial judge, and by failure to make timely objection they have waived any claim of error.

(b) The supplemental instruction was a correct statement of the law.

The jury submitted the following note to the trial judge.

> "The jury would like to know if it would be permissable (sic) to play goverment (sic) recordings in a court if they were available."

The court replied:

> "The records are unavailable. Furthermore, they are not in evidence. Therefore you may not have them." (Stipulation augmenting record on appeal.)

As has been demonstrated, supra, there was ample testimony establishing the unavailability of the recordings and the circumstances of their erasure. The question of the jury was a hypothetical one, requiring the court to rule in a vacuum on the admissibility of

evidence it had no opportunity to inspect.[14] Admissibility of the recordings could only have been determined after proper foundation had been laid and they had been sufficiently identified and their materiality, relevancy and competency shown.

It would, indeed, have been improper for the court to instruct the jury "upon a supposed or conjectural state of facts, of which no evidence has been offered."

United States v. Breitling, 20 How. 252,254, 255, quoted with approval in *Quercia v. United States,* 289 U.S. 466, 471.

Refusal to instruct the jury that the testimony of an absent informer, had he been present and testified, should have been viewed with suspicion was held properly refused as an abstract instruction in *Dear Chuck Quong v. United States,* 160 F. 2d 251 (C.A.D.C. 1947).

The court's observation that the recordings were not available, and not in evidence, was obviously correct, and that it was adequate to satisfy the jury is demonstrated by the failure of the jury to request further enlightenment on the subject. It is Hornbook law, and the jury was instructed here, that they are to try the case solely upon the evidence presented in court (Tr. 700).

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[14]Had the recordings been available it is fair to assume that appellants would have objected vigorously to their admission in evidence. It was not until after the government brought out in redirect examination of agent Feldman that the records had been erased that they assumed such importance in the defense arguments. On cross-examination of Feldman the appellants failed to pursue any line of question concerning the recordings or to ask for their production.

Bollenbach v. United States, 326 U.S. 607 is distinguishable on the ground that the instruction there given was characterized by the Supreme Court as "bad law."

CONCLUSION.

For the reasons stated, the judgments of conviction should be affirmed.

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Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

STATUTES.

The applicable statutes read as follows:

Title 26 U.S.C. 2553(a)—Harrison Narcotic Act:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax."

Title 26 U.S.C. 2557(b)—Harrison Narcotic Act:

"Whoever commits an offense or conspires to commit an offense described in this subchapter, subchapter C of this chapter, or parts V or VI of subchapter A of chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty

years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this paragraph, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this paragraph or in section 2(c) of the Narcotic Drugs Import and Export Act, as amended (U.S.C.A., title 21, sec. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the Act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he ac-

knowledges that he is such person, he shall be sentenced as prescribed in this paragraph."

Title 21 U.S.C. 174—Jones-Miller Act:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; section

171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney, whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 18 U.S.C. 371—Conspiracy Statute:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy", each shall be punished as provided by law.